

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of)
)
Auction of Flexible-Use Service Licenses in the) AU Docket No. 21-62
3.45-3.55 GHz Band (Auction 110))
)

PROTECTIVE ORDER

Adopted: August 20, 2021

Released: August 20, 2021

By the Acting Chief, Wireless Telecommunications Bureau, and Chief, Office of Economics and Analytics:

1. Auction 110 will offer 4,060 new flexible-use licenses for spectrum in the 3.45–3.55 GHz band throughout the contiguous United States.¹ The band is currently allocated on a primary basis for federal radiolocation services² and some federal Department of Defense (DoD) incumbent operations will remain after the auction.³ Accordingly, as described in the *3.45 GHz Second Report and Order*⁴ and in the *Auction 110 Procedures Public Notice*,⁵ particular licenses are subject to cooperative sharing requirements.

2. On July 12, 2021, DoD held a workshop to provide further information on its transition and coordination plans.⁶ In addition, DoD partnered with the National Coordinating Center for Communications (NCC), part of the Department of Homeland Security’s Cybersecurity and Infrastructure Security Agency, to share sensitive information regarding DoD’s incumbent operations, and NCC

¹ *Auction of Flexible Use Licenses in the 3.45–3.55 GHz Band For Next Generation Wireless Services; Notice and Filing Requirement, Minimum Opening Bids, Upfront Payments, and Other Procedures for Auction 110; Bidding in Auction 110 Scheduled to Begin October 5, 2021*, AU Docket No. 21-62, Public Notice, DA 21-655, at 5-6, paras. 7-9, Section I.C (Description of Licenses to be Offered in Auction 110) (OEA and WTB, rel. June 8, 2021) (*Auction 110 Procedures Public Notice*); *Change to Select Inventory Announced for the Auction of Flexible-Use Service Licenses in the 3.45-3.55 GHz Band for Next-Generation Wireless Services (Auction 110), et al.*, AU Docket No. 21-62, Public Notice, DA 21-738, at 4-6, paras. 11-17, Section III. (Inventory Changes for Auction 110) (OEA and WTB, rel. June 23, 2021) (*Auction 110 Inventory Public Notice*).

² See *Facilitating Shared Use in the 3100-3550 MHz Band*, WT Docket No. 19-348, Second Report and Order, Order on Reconsideration, and Order of Proposed Modification, 36 FCC Rcd 5987, 5991-92, para. 8 (2021) (*3.45 GHz Second Report & Order*).

³ See *id.* at 5997-6009, paras. 20-57.

⁴ See *id.* at 5991-92, 5997-6009, paras. 8-9, 21, 20-57.

⁵ *Id.* at 6009, para. 56; *Auction 110 Procedures Public Notice* at 39, para. 115, Section III.B.1.a (Cooperative Sharing in the 3.45–3.55 GHz Band). We provided further guidance and information about the coordination procedures on June 2, 2021. *The Federal Communications Commission and the National Telecommunications and Information Administration: Coordination Procedures in the 3.45–3.55 Band*, WT Docket No. 19-348, Public Notice, DA 21-645 (WTB Jun. 2, 2021) (*Joint Coordination Public Notice*). See also *Auction 110 Inventory Public Notice* at 4-6, paras. 11-17, Section III. (Inventory Changes for Auction 110).

⁶ See <https://www.ntia.doc.gov/page/07122021-dod-workshop-information>.

distributed this information to its industry members.⁷ In addition, DoD has facilitated access to this information by the FCC. In order to facilitate auction applicants' preparation for and participation in Auction 110, and in coordination with the DoD, we will allow appropriate representatives of auction applicants who have a need to view this sensitive information to do so, subject to certain safeguards even if the auction applicant is not an NCC member, as long as the representatives are U.S. citizens.

3. We find that allowing limited access to these sensitive materials pursuant to the procedures set forth in this Protective Order will provide proper protection while also providing the auction applicants (through appropriate representatives) useful information about the licenses on which they may bid. Accordingly, sensibly balancing the public and private interests involved, we conclude that these procedures serve the public interest and adopting them "best conduce[s] to the proper dispatch of the Commission's business and to the ends of justice."⁸

4. *Definitions.* As used herein, capitalized terms not otherwise defined in this Protective Order shall have the following meanings:

"Acknowledgment" means the Acknowledgment of Confidentiality attached as Appendix B hereto.

"Auction Applicant" means a person or entity that has filed an application to participate in Auction 110, referred to as a short-form application or FCC Form 175, and has selected in its application one or more license areas that overlap with coordination areas.⁹

"DoD CUI" means DoD's unredacted transition plans and anticipated power level curves for high-power radar sites and related information that have been marked as Controlled Unclassified Information,¹⁰ or CUI, by DoD.

"Counsel" means an attorney or firm of attorneys who is a United States citizen and who is employed or retained by an Auction Applicant in this proceeding or employed or retained by an affiliated entity and who is actively engaged in the conduct of this proceeding.

"Outside Consultant" means a consultant or expert who is a United States citizen and who is retained for the purpose of assisting Outside Counsel or an Auction Applicant in this proceeding.

"Outside Firm" means a firm, whether organized as a partnership, limited partnership, limited liability partnership, limited liability company, corporation, or otherwise, of Outside Counsel or Outside Consultants.

"Reviewing Party" means a United States citizen who is authorized to access DoD CUI pursuant to paragraphs 5 or 8 of this Protective Order.

"Support Personnel" means employees of a Reviewing Party's Outside Firm, third-party contractors, and employees of third-party contractors who are United States citizens and who are assisting in this proceeding, provided such persons are involved solely in performing clerical or ministerial functions with regard to documents and information connected with this proceeding, including performing one or more aspects of organizing, filing, coding, converting, storing, or retrieving documents

⁷ DoD designated the information it shared with NCC "Controlled Unclassified Information" or "CUI," a category of information that should remain non-public but generally may be shared with people who have a need to know it. See 32 CFR § 2002.4.

⁸ 47 U.S.C. § 154(j).

⁹ See *3.45 GHz Second Report and Order*, 36 FCC Rcd at 5998-6009, paras. 23-57; *Auction 110 Procedures Public Notice* at 39, para. 115.

¹⁰ See 32 CFR § 2002.4.

or data or designing programs for handling data connected with this proceeding.

5. *Procedure for Obtaining Access to DoD CUI.* Access to DoD CUI is limited to United States citizens who are employed by or represent an Auction Applicant and who are authorized by the Auction Applicant to seek access,¹¹ and to their Support Personnel who have a need to see DoD CUI. Any person seeking access to DoD CUI subject to this Protective Order shall sign and date the Acknowledgment agreeing to be bound by the terms and conditions of this Protective Order, and send the Acknowledgment to the Commission at auction110@fcc.gov at least five business days prior to such person's reviewing or having access to DoD CUI. The Acknowledgment and information contained in the Acknowledgment may be shared with the U.S. Department of Defense and other federal agencies. If the Commission or another federal agency objects at any time and for any reason to the disclosure of DoD CUI to a person who has filed an Acknowledgment, that person shall not have access (or further access) to DoD CUI until the objection is resolved in his or her favor.

6. *Review of DoD CUI.* A Reviewing Party shall contact auction110@fcc.gov to receive instructions on how to obtain and review DoD CUI. Persons reviewing DoD CUI must have in place procedures at their firm or office to prevent unauthorized disclosure of DoD CUI; those procedures must include, at a minimum, the procedures described in Appendix A hereto.

7. *Use of DoD CUI.* Persons obtaining access to DoD CUI under this Protective Order shall use the information solely for the preparation and conduct of this proceeding before the Commission and any subsequent judicial proceeding arising directly from that portion of this proceeding and, except as provided herein, shall not use such documents or information for any other purpose, including without limitation business, governmental, or commercial purposes, or in any other administrative, regulatory, or judicial proceedings.

8. *Permissible Disclosure.* Subject to the Commission's prohibited communications requirements and procedures,¹² a Reviewing Party may discuss and share the contents of DoD CUI with another Reviewing Party representing the same Auction Participant; with Support Personnel, as appropriate; with those staff of the Department of Defense and the National Telecommunications and Information Administration who are authorized to see the information; and with the Commission and its staff who are authorized to see the information. Information derived from DoD CUI shall be treated as DoD CUI unless the Commission determines otherwise.

9. *Non-Disclosure of DoD CUI.* Except with the prior written consent of DoD or as provided under this Protective Order, DoD CUI shall not be disclosed further.

10. *Requests for Additional Disclosure.* If any person requests disclosure of DoD CUI outside the terms of this Protective Order, such a request will be treated in accordance with Sections 0.442 and 0.461 of the Commission's rules.¹³

11. *Protection of DoD CUI.* A Reviewing Party shall have the obligation to ensure that access to DoD CUI is strictly limited as prescribed in this Protective Order. A Reviewing Party shall have the further obligation to ensure that DoD CUI is used only as provided in this Protective Order.

12. *Client Consultation.* Nothing in this Protective Order shall prevent or otherwise restrict Counsel from rendering advice to their clients relating to the conduct of this proceeding and any

¹¹ If the individual requesting access to the confidential information on behalf of an applicant is not the certifying official listed in the applicant's FCC Form 175 short-form application, then the certifying official must notify the FCC via auction110@fcc.gov that it is authorizing that individual to seek access on behalf of the applicant. See *WTB And OEA Release Protective Order to Provide Auction 110 Applicants Access to Confidential Information on Department of Defense Systems in the 3.45-3.55 GHz Band*, AU Docket No. 21-62, Public Notice, DA 21-1023 (rel. Aug. 20, 2021).

¹² See 47 CFR 1.2105(c). See generally *Auction 110 Procedures Public Notice* at 16-22, paras. 43-66.

¹³ 47 CFR §§ 0.442, 0.461.

subsequent judicial proceeding arising therefrom and, in the course thereof, relying generally on examination of DoD CUI to which they have access under this Protective Order; *provided, however*, that in rendering such advice and otherwise communicating with such clients, Counsel shall not disclose DoD CUI and shall follow the Commission's prohibited communications rules and procedures.

13. *No Waiver of Confidentiality.* Disclosure of DoD CUI as provided herein by any person shall not be deemed a waiver by the United States Government or any Department or Agency thereof of any privilege or entitlement to confidential treatment of such DoD CUI. Reviewing Parties, by viewing this material, agree: (1) not to assert any such waiver; (2) not to use DoD CUI to seek disclosure in any other proceeding; and (3) that accidental disclosure of DoD CUI to a Reviewing Party shall not be deemed a waiver of any privilege or entitlement.

14. *Subpoena by Courts, Departments, or Agencies.* If a court, or a federal or state department or agency, issues a subpoena for or orders the production of DoD CUI that a party has obtained under the terms of this Protective Order, such party shall promptly notify the Commission of the pendency of such subpoena or order. Consistent with the independent authority of any court, department, or agency, such notification must be accomplished such that the Commission and the United States Department of Defense has sufficient opportunity to oppose such production prior to the production or disclosure of any DoD CUI.

15. *Violations of the Protective Order.* Should a Reviewing Party violate any of the terms of this Protective Order, such Reviewing Party shall immediately convey that fact to the Commission.¹⁴ Further, should such violation consist of improper disclosure of DoD CUI, the violating person shall take all necessary steps to remedy the improper disclosure. The Commission retains its full authority to fashion appropriate sanctions for violations of this Protective Order, including but not limited to suspension or disbarment of Counsel or Consultants from practice before the Commission, forfeitures, cease and desist orders, and denial of further access to DoD CUI or any other Confidential or Highly Confidential Information in this or any other Commission proceeding. Nothing in this Protective Order shall limit any other rights and remedies available to the Commission or any Department of the United States at law or in equity against any person using DoD CUI in a manner not authorized by this Protective Order.

16. *Termination of Proceeding.* The provisions of this Protective Order shall not terminate at the conclusion of this proceeding. Reviewing Parties shall destroy any DoD CUI in their possession that they obtained pursuant to this Protective Order within two weeks of either: a) if representing an Auction Applicant that does not become a qualified bidder, the public notice announcing qualified bidders and any administrative or judicial review thereof; b) if representing an Auction Applicant that becomes a qualified bidder, the release of the public notice announcing the close of the bidding and the auction results and any administrative or judicial review thereof. No material whatsoever containing or derived from DoD CUI may be retained by any person having access thereto, except Outside Counsel and Outside Consultants may retain, under the continuing strictures of this Protective Order, two copies of pleadings (one of which may be in electronic format) prepared in whole or in part by that party that contain DoD CUI, and one copy of orders issued by the Commission or Bureau that contain DoD CUI. All Reviewing Parties shall certify compliance with these terms and shall file such certification with the Commission not more than three weeks after conclusion of this proceeding. Such certification shall be made pursuant to 28 U.S.C. § 1746 and is subject to 18 U.S.C. § 1001. The provisions of this paragraph regarding retention of DoD CUI shall not be construed to apply to the Commission or its staff.

¹⁴ Under current guidelines issued by the federal Cybersecurity and Infrastructure Security Agency, notifications should be made within one hour.

17. *Questions.* Questions concerning this Protective Order should be addressed to auction110@fcc.gov or to Joel Rabinovitz, Joel.Rabinovitz@fcc.gov, (202) 418-0689, Office of General Counsel.

18. *Authority:* This Order is issued pursuant to Sections 4(j), 309, and 310(d) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(j), 309, and 310(d), Section 4 of the Freedom of Information Act, 5 U.S.C. § 552(b)(4), and authority delegated under Sections 0.21(a), (f), (m), 0.131(b), (g), (h), 0.271(a), and 0.331(a), of the Commission's rules, 47 CFR §§ 0.21(a), (f), (m), 0.131(b), (g), (h), 0.271(a), and 0.331(a), and is effective upon its adoption.

FEDERAL COMMUNICATIONS COMMISSION

Giulia McHenry
Chief, Office of Economics and Analytics

Joel Taubenblatt
Acting Chief, Wireless Telecommunications Bureau

APPENDIX A
Procedures of Protecting DoD CUI

As specified in paragraph 6 of the Protective Order, Reviewing Parties must have in place procedures at their firm or office to prevent unauthorized disclosure of DoD CUI. Those procedures must, at a minimum, comply with the following:¹⁵

- During working hours, steps must be taken to minimize the risk of access by unauthorized personnel, such as not reading, discussing, or leaving DoD CUI unattended where unauthorized personnel are present.
- After working hours, DoD CUI must be stored in locked desks, file cabinets, bookcases, locked rooms, or similarly secured areas.
- DoD CUI may be transmitted electronically (e.g., data, website, or e-mail), via approved secure communications systems or systems utilizing other protective measures such as Public Key Infrastructure or transport layer security (e.g., https). Wireless telephone transmission of DoD CUI should be avoided if other options are available.

¹⁵ See generally DoD Instruction 5200.48 – Controlled Unclassified Information, available at <https://www.esd.whs.mil/Portals/54/Documents/DD/issuances/dodi/520048p.PDF>.

APPENDIX B

Acknowledgment of Confidentiality

AU Docket No. 21-62

I am seeking access to DoD CUI.

I have been authorized by the Auction Applicant listed below to seek access on its behalf.

I hereby certify under penalties of perjury that I am a citizen of the United States of America.

I acknowledge that I have received and read a copy of the foregoing Protective Order in the above-captioned proceeding, and I understand it.

I agree that I am bound by the Protective Order and that I shall not disclose or use DoD CUI except as allowed by the Protective Order.

I acknowledge that it is my obligation to ensure that DoD CUI is not duplicated except as specifically permitted by the terms of the Protective Order and to ensure that there is no disclosure of DoD CUI in my possession, in the possession of those who work for me, or in the possession of other Support Personnel, except as provided in the Protective Order.

I certify that I have verified that there are in place procedures at my firm or office to prevent unauthorized disclosure of DoD CUI and that those procedures include, at a minimum the procedures described in Appendix A to the Protective Order.

I acknowledge that a violation of the Protective Order is a violation of an order of the Federal Communications Commission (Commission). I further acknowledge that the Commission retains its full authority to fashion appropriate sanctions for violations of this Protective Order, including but not limited to suspension or disbarment of Counsel or Consultants from practice before the Commission, forfeitures, cease and desist orders, and denial of further access to DoD CUI or other confidential information in this or any other Commission proceeding.

I acknowledge that nothing in the Protective Order limits any other rights and remedies available at law or in equity against me if I use DoD CUI in a manner not authorized by this Protective Order.

Capitalized terms used herein and not otherwise defined shall have the meanings ascribed to them in the Protective Order.

Executed this ___ day of _____, 20__.

[Name]
[Position]
[Firm]
[Telephone]
[email address]
[Auction Applicant]